STATE OF MICHIGAN

COURT OF APPEALS

DONALD BROCK and NANCY BROCK,

Plaintiffs-Appellees,

v

DANIEL DYE and PATRICK RANES,

Defendants-Appellants,

and

UNIVERSAL MACOMB AMBULANCE, INC., DAVID FERGUSON, EDWIN MILLER, L. LIPKE, R. KRUPP, and LOUIS STAVELLE,

Defendants,

and

MACOMB COUNTY EMERGENCY MEDICAL SERVICES and H. ECLO,

Defendants-Not Participating.

UNPUBLISHED
February 16, 2006

No. 255985
Macomb Circuit Court
LC No. 2003-001477-NH

Before: Cavanagh, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendants appeal by right the trial court's order denying their motion for summary disposition based on their assertion of governmental immunity. Defendants are firefighter/paramedics who transported plaintiff Donald Brock to the hospital after he suffered a seizure.[1] These actions were brought against defendants alleging that they fractured plaintiff's shoulder and hip during transport. The trial court denied defendants' motion for summary disposition after determining that there was a genuine issue of material fact as to whether

[1] Plaintiff Nancy Brock's claim is derivative of her husband's claim therefore we refer to Donald Brock as "plaintiff" in this opinion.

defendants' conduct while restraining plaintiff during transit was grossly negligent. We reverse and remand for entry of summary disposition in favor of defendants.

Defendants assert that the trial court erred in denying their motion for summary disposition pursuant to MCR 2.116(C)(7), on the basis of governmental immunity, and MCR 2.116(C)(10), because no genuine issue of material fact remains as to whether defendants' conduct while transporting plaintiff was grossly negligent and the proximate cause of plaintiff's injuries. We agree. A trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Furthermore, the applicability of governmental immunity is a question of law, which is reviewed de novo on appeal. *Herman v Detroit*, 261 Mich App 141, 143; 680 NW2d 71 (2004).

Summary disposition pursuant to MCR 2.116(C)(7) is proper when, after considering the documentary evidence and accepting the contents of the complaint as true, the claim is barred by immunity granted by law. *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Upon review, the court considers the documentary evidence submitted in the light most favorable to the party opposing the motion to determine if the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(5); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

Here, it is uncontested that defendants, as employees of the city of Sterling Heights, are immune from tort liability if their conduct did not amount to gross negligence that was the proximate cause of plaintiff's injuries. See MCL 691.1407(2). Plaintiff argues that the doctrine of res ipsa loquitur applies in Michigan and warrants an inference of negligence that occurred during transport because plaintiff did not have fractures at the time he was placed into the ambulance but had fractures when he reached the hospital. However, as noted by defendants, our Michigan Supreme Court has found that, "[w]hile the doctrine of res ipsa loquitur may assist in establishing ordinary negligence, the doctrine is not available where the requisite standard of conduct is gross negligence or willful and wanton misconduct." *Maiden*, *supra* at 127 (citations omitted). Furthermore, "evidence of ordinary negligence does not create a material question of fact concerning gross negligence." *Id*. at 122-123 (citations omitted). Therefore, plaintiff cannot rely on res ipsa loquitur to create a material question of fact as to whether defendants were *grossly* negligent.[2]

[2] Plaintiff argues that this Court should not follow our Supreme Court's decision in *Maiden*, *supra*, because the portion of the opinion in *Maiden* in which the Court found that res ipsa loquitur did not apply is dicta. However, in finding that res ipsa loquitur cannot be used to infer gross negligence, our Supreme Court responded not only to the plaintiff's argument but also to the argument raised by the dissent in that case. *Id*. at 127 n 10. Furthermore, the discussion regarding res ipsa loquitur was central to our Supreme Court's resolution of *Maiden* because, had the Court found the application of res ipsa loquitur to be sufficient evidence of gross negligence to survive a motion for summary disposition, the Court would have affirmed the Court of Appeal's decision. Therefore, our Supreme Court's decision in *Maiden*, *supra*, regarding the use of res ipsa loquitur in cases involving a gross negligence standard is not dicta and, regardless of plaintiff's additional comment that the decision is supported "merely with secondary sources and
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Instead, a plaintiff must present evidence of conduct "so reckless as to demonstrate a substantial lack of concern for whether an injury results." *Maiden, supra* at 123. As evidence of such conduct, plaintiff refers to the paramedics' testimony that plaintiff was combative during transport so that they had to restrain him. Defendant Patrick Ranes testified that he held plaintiff's left arm over plaintiff's head in a standard restraint position to keep him from moving around much. However, Dr. James Anderson, the orthopedic surgeon who treated plaintiff's injuries, testified that the action of moving plaintiff's arm from his side to above his head would not cause plaintiff's shoulder's fracture dislocation, *even if plaintiff was struggling*. Anderson further testified that plaintiff's shoulder injury is the type of injury he sees fairly commonly associated with seizures. Therefore, even with Ranes' testimony that he restrained plaintiff's arm in this manner, in light of the paramedics' testimony that plaintiff had to be restrained because he was combative and Anderson's testimony that Ranes' method of restraining plaintiff's arm would not have caused his shoulder injury, plaintiff has not only failed to present evidence that Ranes' conduct was "so reckless as to demonstrate a substantial lack of concern for whether an injury results" but has also failed to show that his conduct was the proximate cause of plaintiff's shoulder injury.

As other evidence of how plaintiff suffered his pelvic injury, plaintiff relies on the deposition of Louis Stavelle, who rode with the ambulance that day, who testified that defendant Daniel Dye "straddled" plaintiff during transport. Because there would not be room for Dye's left foot on the left side of the stretcher, plaintiff argues that Dye must have placed his knee on plaintiff's hip while straddling him. However, plaintiff ignores Stavelle's testimony in which he explained that he remembers Dye leaning over but was not positive whether Dye straddled plaintiff and does not remember where Dye's feet were at the time. Furthermore, even assuming that plaintiff's argument is correct, part of Dye's concern was the need to establish an IV in case plaintiff were to have another seizure so that they could administer Valium to stop it. And, even assuming that Dye placed his knee (and weight) on plaintiff's hip during transport to the hospital, Anderson testified that this conduct would not have caused plaintiff's pelvic fracture. Therefore, even with an assumption that Stavelle's reference to Dye "straddling" plaintiff was correct and that this then meant Dye "kneeled" on plaintiff's hip, in light of the paramedics' testimony that plaintiff had to be restrained because he was combative and that an IV was necessary for plaintiff's safety in case he suffered another seizure, and Anderson's testimony that this conduct would not have caused his pelvic injury, plaintiff has failed to present evidence that Dye's conduct was "so reckless as to demonstrate a substantial lack of concern for whether an injury results" and, further, failed to present evidence that such conduct was the proximate cause of plaintiff's pelvic injury.

In sum, considering the evidence presented, no material factual question remains regarding whether defendants' conduct was grossly negligent or the proximate cause of plaintiff's injuries; therefore, the trial court erred in denying defendants' motion for summary disposition.

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the opinions of other circuits," this Court is bound to follow our Supreme Court's decisions. *Boyd v W G Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993).

Reversed and remanded for entry of summary disposition in favor of defendants pursuant to MCR 2.116(C)(7) and (10). We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra
/s/ Jane E. Markey